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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER JOHN OCHOA,

Defendant and Appellant.

No. A154852

(Mendocino County Super. Ct.
No. SCTM CRCR 13-71192)

Defendant Christopher John Ochoa appeals from his sentence of 13 years in state prison, which is comprised of the mid-term of three years for assault with a firearm in violation of Penal Code section 245, subdivision (a)(2)¹ and the upper term of 10 years for his personal use of a firearm in the commission of this assault in violation of section 12022.5, subdivision (a). The court imposed this sentence after the parties reached a negotiated disposition of the case. This disposition included defendant's entering a guilty plea to the assault charge and admitting the truth of the enhancement allegation. Defendant's court-appointed counsel has filed a brief that does not raise any legal issues. Counsel requests that this court independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Defendant was informed of his right to file a supplemental brief and has not done so. Upon our independent review of the record pursuant to *Wende*, we conclude there are no arguable appellate issues requiring further briefing and affirm the judgment.

¹ All statutory citations are to the Penal Code unless otherwise stated.

BACKGROUND

In 2013, the Mendocino County District Attorney filed an information charging defendant and a co-defendant with mayhem (§ 203), assault with a firearm (§ 245 subd. (a)(2)) and permitting another to discharge a firearm from a vehicle (§ 26100, subd. (b)).

Preliminary hearing testimony indicated that defendant, a passenger in the co-defendant's moving vehicle, fired a shotgun multiple times at a car parked in a driveway in a residential neighborhood on the night of January 29, 2013. The parked car's owner was smoking a cigarette by the car. She saw a white vehicle with windows rolled down slow as it went by her home, heard a male voice coming from the vehicle say, "That's the car, that's the car, that's the car," heard four shots and was hit by shotgun pellets in her eye and face. She saw shadows indicating there was a person in the front and a person in the rear of the vehicle. She lost the sight of her eye and had shotgun pellets embedded in her face as a result of the shooting.

Witnesses' accounts led police to the vehicle later that night. Police saw expended shotgun shells on the passenger side of the vehicle, which were in plain view. A number of expended shotgun shells were also recovered in the street where the shooting occurred. Later that night, police found defendant and co-defendant at defendant's girlfriend's home. The co-defendant indicated that defendant had been the shooter. Defendant's girlfriend led police to a shotgun, missing a butt stock, that was hidden in a pile of brush behind her home. The shotgun was of the same gauge as the shells police recovered from the car and the residential street.

The court severed the proceedings against the defendant and co-defendant. Prior to defendant's trial, however, he failed to appear; a bench warrant was issued, bail was declared forfeited and the jury trial date was vacated. About four years later, in 2017, defendant was taken into custody. The prosecution was permitted to file an amended information that charged defendant with felony mayhem (§ 203), felony assault with a firearm (§ 245, subd. (a)(2)) and felony discharge of a firearm from a motor vehicle (§ 26100, subd. (d)), and also included certain enhancement allegations.

The parties subsequently agreed to a negotiated disposition of the case. Defendant completed a written plea waiver form indicating that he understood the plea agreement, had consulted with his counsel, waived his constitutional and statutory rights, pleaded guilty to felony assault with a firearm (§ 245, subd. (a)(2)) and admitted the truth of the related personal use of a firearm enhancement allegation (§ 12022.5, subd. (a)). The prosecution agreed to dismissal of the other charges and enhancements, subject to defendant's *Harvey* waiver that allowed the court to consider the underlying facts regarding the dismissed counts in sentencing. (See *People v. Harvey* (1979) 25 Cal.3d 754, 758.) The parties agreed that the court would have the discretion to impose a sentence of no less than 5 years and no more than 14 years in state prison. Among other things, defendant indicated his understanding that the court could consider the preliminary hearing transcript as a factual basis for his plea, that he was pleading guilty to a serious violent felony that would constitute a "strike offense," and that the court would limit his prison conduct/work-time credits to 15 percent of his actual days served.

At the hearing on this negotiated disposition, the court indicated it had not read the preliminary hearing transcript, but that counsel had stated a factual basis for the charge and enhancement allegation in chambers. It asked the prosecutor to state the factual basis for defendant's plea. The prosecutor stated: "On January 29, 2013, in Gualala in Mendocino County the defendant from a vehicle discharged a firearm, specifically a shotgun, in the direction of another vehicle multiple times. One of the shots hit Guadalupe [M.] and, as a result, she is unable to see out of her right eye." The court found that defendant had been informed of his rights, understood the nature of the allegations made against him and the consequences of his plea and admissions, expressly, knowingly, understandingly and intelligently waived his constitutional and statutory rights, freely and voluntarily made his plea, admissions and waiver of rights, and that there was a factual basis for his plea and admissions. The court accepted his plea, admissions and waiver of rights, and found him guilty.

The probation department prepared a report and recommendation regarding sentencing. It indicated that defendant appeared remorseful for his actions. However, the

department concluded that defendant had made “a dangerous and egregious decision to (in essence) do a ‘drive-by shooting’ in a neighborhood where there could have been numerous victims, and it could have even been fatal. . . . For these reasons, coupled with the victim’s injuries and the fact that the defendant evaded responsibility for many years,” the department recommended defendant receive an aggravated sentence of 14 years in state prison.

On June 29, 2018, the court held a sentencing hearing. The court indicated that a new law gave it discretion to strike the personal use of a firearm enhancement, but said that was “not a legitimate concern for me.” The court expressed a concern about whether it could impose a consecutive term for the enhancement under the circumstances of the case, but concluded, with counsel’s agreement, that it could do so.

Defense counsel argued that the court should sentence defendant to the lower terms for both the conviction and the enhancement allegation because defendant did not intend to shoot the victim; the victim’s injury, while severe, had not been inflicted with cruelty, viciousness, or callousness; defendant was not the instigator of the underlying problems and was in the co-defendant’s car using the co-defendant’s gun; defendant, while he had evaded judicial process for several years, had matured greatly and lived a law-abiding and honorable lifestyle in Mexico during that time; the enhancement allegation was for much the same conduct as the assault; and the co-defendant had been sentenced to what amounted to 28 months of actual time in prison. Defense counsel requested a midterm sentence of three years for the assault conviction and a consecutive low term of three years for the enhancement allegation, for a total of six years in state prison, “at 85 percent,” an apparent reference to the limitation on defendant’s prison conduct/work-time credits.

The prosecutor noted that the victim indicated she had suffered a serious injury that had many consequences in her life and asked that defendant be sentenced to the maximum allowed under the law. The prosecutor agreed with the probation department’s analysis, thought there were multiple circumstances in aggravation and asked that the court sentence defendant to the aggravated term for both the assault with a firearm

conviction and the personal use of a firearm enhancement.

The court noted defendant was presumptively ineligible for probation, there were no unusual circumstances that merited probation, and the plea agreement called for defendant to be sentenced to state prison. It sentenced defendant to the midterm of three years for the assault with a firearm conviction, denoting it a violent felony. As for the personal use of a firearm enhancement, the court found in aggravation that the victim had suffered significant permanent injuries, and that defendant by his drive-by shooting in a residential neighborhood had endangered others as well. The court imposed the upper term sentence of ten years for the enhancement, to run consecutively with the three-year term for assault. It awarded defendant presentence custody credits of 313 days, as well as conduct credits of 46 days under section 2933.1, for a total of 359 days. It also imposed standard fines and fees, reducing some, and reserved the authority to order defendant to pay restitution to the victim.

Defendant filed a timely notice of appeal.

DISCUSSION

We have conducted an independent review of the record under *Wende* and have not found any arguable appellate issues. The court's sentence was within the range stated in the negotiated disposition and the governing law. (§ 245, subd. (a)(2) [assault with a firearm punishable by a state prison term of two, three or four years]; § 12022.5, subd. (a) [personal use of a firearm in the commission of a felony "shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense"].) There is no indication in the record that defendant did anything other than voluntarily, knowingly and intelligently admit to committing these crimes upon consulting with counsel and waiving his constitutional and statutory rights to contest the charges. The preliminary hearing transcript indicates there was a factual basis for his plea and admissions. Further, a court may impose sentences for both an assault with a firearm and for a related personal use of a firearm enhancement, since personal use is not an element of the assault. (See *People*

v. Equarte (1986) 42 Cal.3d 456, 466 [“personal use” is not a necessary element of an assault with a deadly weapon offense].)

As for the court’s imposition of an upper term sentence for the personal use of a firearm allegation, a trial court may in its discretion impose an aggravated sentence if even one of the aggravating factors listed in California Rules of Court, rule 4.421 is met. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, defendant repeatedly fired a shotgun from a moving car at night in a residential neighborhood, causing serious, permanent injuries to the victim, and fled after his arrest rather than stand trial. Based on these facts, more than one aggravating factor was met. (See Cal. Rules of Court, rule 4.421(a)(1) [crime involved great bodily harm]; *id.*, rule 4.421(a)(6) [defendant illegally interfered with the judicial process]; *id.*, rule 4.421(b)(1) [defendant has engaged in violent conduct that indicates a serious danger to society].) There is no indication that the trial court abused its discretion in sentencing him to an upper term.

Further, assault with a firearm is both a serious and violent felony. (§§ 1192.7, subd. (c)(31), 667.5, subd. (c)(8).) Any person who is convicted of a felony listed in section 667.5, subdivision (c) may accrue “no more than 15 percent of worktime credit, as defined in section 2933.” (§ 2933.1, subd. (a); see also *People v. Chism* (2014) 58 Cal.4th 1266, 1337 [referring to section 2933.1’s “15 percent” rule as applying to “conduct credits”].)

Finally, we have not found any arguable appellate issues regarding the court’s other sentencing decisions.

DISPOSITION

We have conducted an independent review of the record under *Wende* and conclude there are no arguable appellate issues requiring further briefing. The judgment is affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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